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# The Debates About Same-Sex Marriage in Canada and the United States: Controversy Over the Evolution of a Fundamental Social Institution

*Nicholas Bala\**

## I. INTRODUCTION: THE DEBATES ABOUT SAME-SEX MARRIAGE IN CANADA & THE UNITED STATES

Marriage is one of the oldest social institutions, predating recorded history, law, and perhaps even religion. Marriage has not been a static social or legal institution, but rather has changed over the course of history in response to changing religious beliefs, social values and behaviors, technology, and even demographics. Similarly there is great variation today in marital behaviors, attitudes, and laws about marriage in different countries.

Currently debates over whether and how to redefine marriage and marriage-like relationships to accommodate same-sex couples are raging across two neighboring North American jurisdictions, Canada and the United States. Major changes in marriage laws are inevitably controversial, with opponents of legal reform often raising the specter of dire social consequences if “traditional marriage” is altered.<sup>1</sup> Previous changes in marriage laws both reflected and reinforced changes in attitudes towards behavior in marriage. Despite profound changes in the legal and social nature of marriage, marriage has remained a fundamental social institution, with primary responsibility for the nurturing and care of children. As a society changes, the question which must be faced is whether the legal rules that were developed in the past to govern the

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1. See, Tamar Lewin, *Ideas & Trends: Untying the Knot; For Better or Worse: Marriage’s Stormy Future*, N.Y. TIMES LATE EDITION, Nov. 23, 2003, at 1.

definition of marriage and spousal relationships continue to best meet current social, economic, cultural, and spiritual needs and circumstances.

While the present controversy centers on the question of what legal and social recognition should be given to same-sex relationships, the debates are raising deeper issues about the nature of marriage and the roles of law and religion in society. Although Canada and the United States share a common cultural and legal heritage, and there are many similarities and common influences in law, culture, economics, and politics, there are also significant differences. In both countries constitutional litigation and legislative reforms have resulted in significantly increased recognition of same-sex relationships, but the process of recognition began earlier in Canada and has now progressed further.

This paper compares the controversies over the definition of marriage and the evolution in the recognition of same-sex relationships in Canada and the United States over the past few decades. The paper includes a consideration of the influences that developments in each of these countries has on the other, as these are issues for which advocates, courts, and legislatures have been giving considerable attention to cross-border developments. I will not, however, consider the complex issues that American courts will have to address about the recognition of same-sex marriages entered into in Canada.<sup>2</sup>

## II. THE EVOLUTION OF MARRIAGE: SETTING THE STAGE FOR THE PRESENT DEBATES

While some today are arguing that religion should have no place in the current debate about the legal definition of marriage,<sup>3</sup> religion historically established the legal basis of marriage throughout much of the world. In Canada and the United States, marriage law was largely based on Christian doctrine about marriage, in particular as reflected in the English common law.<sup>4</sup>

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2. A significant legal issue is what legal recognition will be given to American same-sex partners who come to Canada to marry. Media reports suggest that as many as one-third of all same-sex marriages in Canada have involved American couples, though there is significant doubt as to whether these marriages will have legal recognition in their home states. *See, e.g.*, Tim Naumetz, *Canada a Mecca for "Quickie Gay Marriages,"* NAT'L POST, May 13, 2005, at A5.

3. *See, e.g.*, Elizabeth Thompson & Anne Dawson, *Church Told to Butt Out: Same-Sex Debate No Place for Religion: Pettigrew,* NAT'L POST, Jan. 28, 2005, at A1.

4. There is, of course, some variation within Christian faiths in terms of marriage doctrine, which was to some extent reflected in variations in marriage law between jurisdictions in North America. For example, some jurisdictions, such as Quebec and Louisiana, had strong Catholic traditions and influences, and a civilian legal heritage. There were also Aboriginal marital traditions and rules that were very different from the Christian ideas of marriage. This paper will focus on a

The Old Testament of the Bible accepts a view of marriage that included both polygamy and monogamy. The New Testament of the Bible recognizes the special nature of marriage and the importance of marital love. Polygamy is not condemned in the New Testament, but by the time of the Reformation in the 16th century, major Christian faiths in Europe had come to accept that marriage was to be monogamous.<sup>5</sup> When the Mormon faith was founded in the early 19th century, it was premised on a polygamous view of marriage, though in the latter half of the 19th century, laws were enacted in North America to criminalize polygamy, and in 1890 the Mormon Church adopted a monogamous view of marriage. It is, however, estimated that there may be as many as 150,000 Fundamentalist Mormons in North America who continue to practice polygamy.<sup>6</sup> While the practice of polygamy is technically illegal, since 1953 prosecutions have been very rare, and have generally only been against men who have gone through a form of polygamous marriage with an underage girl.<sup>7</sup>

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discussion of the dominant legal heritage in North America, which came from England.

5. The polygamists in the Old Testament include Abraham, Jacob, David and Solomon. By 420 A.D. Saint Augustine condemned polygamy in *The Good of Marriage* (ch. 15, para. 17). However polygamy continued to be practiced in medieval Christian Europe, and in 1563, the Roman Catholic Council of Trent felt it necessary to proclaim: "If anyone says that it is lawful for Christians to have several wives at the same time, and that it is not forbidden by any divine law, let him be anathema."

6. See, e.g., Maura I. Strassberg, *The Challenge of Post-modern Polygamy: Considering Polyamory*, 31 CAP. L. REV. 439 (2003). There are also reports of Muslim polygamous families in North America, but they appear to be relatively few in number. They are generally immigrants from countries where polygamy is legal, although legal migration to Canada and the United States by members of known polygamous families is generally not permitted. See Dena Hassounah-Phillips, *Polygamy and Wife Abuse: A Qualitative Study of Muslim Women in America*, 22 HEALTH CARE FOR WOMEN INT'L 735 (2001); see also Chris Cobb & Bob Harvey, *Canadian Muslim Leader Defends Polygamy: Children Treated Equally*, NAT'L POST, Jan. 21, 2005. There are also Christian, Jewish and secular polygamist marriages in North America. See [www.polygamy.com](http://www.polygamy.com) (last visited Aug. 20, 2005).

7. A discussion of polygamy is beyond the scope of this paper, but it is clear that recognition of same-sex marriage raises very different issues from recognition of polygamy, from both constitutional and social policy perspectives. While the arguments in favor of same-sex marriage are largely based on a claim for equal treatment, polygamous relationships are inherently unequal. There is a growing body of research from both North America and societies where polygamy is widely practiced which finds that there is a greater prevalence of low self-esteem among women living in polygamous relationships than among women in monogamous marriages. Women in these relationships are in an inherently vulnerable and unequal position in social and economic terms, and are more likely to be victims of domestic violence. There are also studies which have found that in comparison to children from monogamous families, children from polygamous families have lower self-esteem, higher levels of self-reported family dysfunction, and lower levels of socio-economic status and academic achievement. See Nicholas Bala, et al., *An International Review of Polygamy: Legal and Policy Implications for Canada*, in POLYGAMY IN CANADA: LEGAL AND SOCIAL IMPLICATIONS FOR WOMEN AND CHILDREN – A COLLECTION OF POLICY RESEARCH REPORTS (2005), available at [http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/index\\_e.html](http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/index_e.html).

Even after the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), held the Constitution prevents the criminalizing of homosexual acts, the Federal Court in Utah has upheld the

In both Canada and the United States the laws and expectations for husbands and wives within marriage have changed dramatically over the past half century, setting the stage for the possible redefinition of marriage to include same-sex partners.<sup>8</sup> The English common law of marriage, upon which laws in most jurisdictions in Canada and the United States were originally founded, had an explicitly Christian basis, and until the middle of the 19th century, legal jurisdiction over much of what today is called “family law” rested in the Ecclesiastical courts, not the King’s Courts.<sup>9</sup> In the traditional legal view of marriage, the husband and wife had very different legal status.<sup>10</sup> The English common law accorded the husband and wife distinctive roles, rights and obligations. The leading 18th century English legal scholar, William Blackstone, expounded on the legal nature of marriage: “By marriage, the husband and wife are one person in law; that is the very being or legal existence of the woman is . . . consolidated into that of the husband.”<sup>11</sup> At common law, a woman who married lost her legal personality, as only her husband could contract or own property.

Historically, from social, economic, and religious perspectives, the procreation of children was viewed as a central purpose of marriage, as was reflected in the common law concept of consummation.<sup>12</sup> Based on canon law principles, at common law the inability to consummate a marriage (engage in opposite-sex intercourse) rendered a marriage voidable. While the jurisprudence discussed the importance of

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constitutional validity of the state’s law prohibiting polygamy. *Bronson v. Swensen*, 394 F. Supp. 2d 1329 (D. Utah 2005). The federal court rejected a challenge by polygamists that these provisions violate the right to free exercise of their religious beliefs under the First Amendment and right to privacy under the Fourteenth Amendment of the American Constitution. The plaintiffs argued that their religion, Fundamentalist Mormonism, requires the practice of polygamy, and they brought the action after one of them was denied a marriage license on the grounds that he was already married. In *Bronson*, Judge Stewart referred to the *Lawrence v. Texas* decision, and concluded that, as the U.S. Supreme Court had carefully delineated the limitations of its ruling, *Lawrence* cannot be used to require Utah to recognize polygamous marriages as legally valid. *Id.* at 1333-34.

8. For a further discussion, see Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 STAN. L. & POL’Y REV. 97 (2005). See also Linda C. McClain, “God’s Created Order,” *Gender Complementarity, and the Federal Marriage Amendment*, 20 BYU J. PUB. L. 313, at 329 (2006) (in this issue) (discussing in Section III.B. how the legal and social changes about family roles and responsibilities are in conflict with laws prohibiting, or at least failing to recognize, same-sex marriages).

9. See Charles J. Reid, Jr., *The Unavoidable Influence of Religion Upon the Law of Marriage*, 23 QUINNIAC L. REV. 493, 494 (2004).

10. Scott Greent, *Comparison of the Property Aspects of the Community Property and Common-Law Marital Property Systems and Their Relative Compatibility with the Current View of the Marriage Relationship and Rights of Women*, 13 CREIGHTON L. REV. 71, 76-79 (1979).

11. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 430 (bk. 1, ch.15) (1765), available at <http://www.yale.edu/lawweb/avalon/blackstone/bk1ch15.htm> (last visited Aug. 15, 2005).

12. See, e.g., *Mills v. Mills*, 62 N.Y.S. 2d 344 (Dom. Rel. Ct. 1946).

procreation to marriage, the common law defined the consummation of marriage in terms of the “apparent ability to conceive.”<sup>13</sup> The ability to engage in sexual intercourse was an essential element of marriage.<sup>14</sup>

Though of course children were born out of wedlock, the English common law enforced a strong link between marriage and childbearing; children born out of wedlock were referred to as “illegitimate,” that is outside of the law, and at common law their fathers had no rights or obligations towards them. The courts regarded women who lived with men outside of marriage as living in a relationship akin to prostitution, and these women had no claims against their partners at the end of a relationship.

Until the latter part of the 20th century, the laws in both Canada and the United States clearly and explicitly reinforced moral expectations and gender roles within marriage. At common law, the legal presumption that the husband was the “head of the household” was so strong that a married woman could not even contract or own property. This common law rule was changed by legislation in the latter part of the 19th century, when married women gained the right to own property and contract.

In the 1866 English case of *Hyde v. Hyde*, Lord Penzance articulated a definition of marriage that is still quoted<sup>15</sup> in the current debates over the definition of marriage: “Marriage, as understood in Christendom, may . . . be defined as the voluntary union for life of one man and one woman to the exclusion of all others.”<sup>16</sup> The judge assumed that Christian religious ideals were to be the basis of the law of England. It is interesting to observe that this definition was actually made in the context of a decision about the non-recognition of potentially polygamous marriages, though the decision is cited today as establishing the centrality of opposite-sex partners for marriage.

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13. See, e.g., *Corbett v. Corbett*, [1970] 2 W.L.R. 1306. The focus on the *apparent* ability to conceive as opposed to the actual ability to conceive was at least in part because until recently the state of medical knowledge was such that it was generally not known why a couple who were engaging in sexual relations were unable to have a child, and whether they might still have a child despite a long period without conception. Further, it would have been very unfair, especially to women, if the actual inability to conceive would have been grounds for annulment or termination of a marriage.

14. Historically, adultery was defined as requiring heterosexual sexual intercourse. In 2005, after Canada adopted same-sex marriage, the British Columbia Supreme Court redefined adultery to include intimate sexual contact with the genitals of a same-sex partner. See *S.E.P. v.D.D.P.* (2005), 259 D.L.R.(4th) 358 (B.C.S.C.); see also John C. Eastman, *Full Faith and Republican Guarantees: Gay Marriage, FMPA, and the Courts*, 20 BYU J. PUB. L. 243, at 253 (2006) (in this issue) (predicting difficulties in drafting and interpreting states’ adultery statutes due to the current and potential future changes in the same-sex marriage arena).

15. See, e.g., Editorial, *Religion and Marriage*, THE GLOBE & MAIL, Feb. 3, 2005, at A20; see also *EGALE Canada Inc. v. Canada (Attorney General)*, [2001] 95 B.C.L.R.3d 122, rev’d, [2003] 13 B.C.L.R. (4th) 1.

16. *Hyde v. Hyde*, (1866) L.R. 1 P. & D. 130, at 133.

Based on principles of canon law, the English common law viewed marriage as indissoluble (though the very wealthy could seek a Parliamentary divorce). It is notable that a few years before *Hyde* was decided in 1866, legislation had been enacted in England to provide for judicial divorce. In 1857, after intense debate, the English Parliament enacted the Matrimonial Causes Act,<sup>17</sup> transferring jurisdiction for family law issues from the Ecclesiastical to the secular courts, and allowing for judicial divorce. As in today's debates over same-sex marriage, the debate in 1857 over whether to allow for the judicial dissolution of marriage engaged religious leaders as well as politicians.

The dates for the introduction of divorce in different jurisdictions in North America varied greatly, with some of the American colonies allowing for judicial divorce even before the Revolution. Judicial divorce generally came to Canada later, and some Canadian provinces did not have judicial divorce until 1968.<sup>18</sup> Until the last part of the 20th century, divorce was relatively rare in North America, and generally only an "innocent party" could obtain a divorce, most commonly based on the adultery or other "marital fault" of the "guilty party."

One of the most significant developments of the past half century in the laws governing marriage has been the rise of "no fault" divorce. Starting with California in 1969, jurisdictions throughout North America experienced the "divorce revolution,"<sup>19</sup> adopting laws that permitted divorce on a "no fault" basis, either instead of, or more commonly in addition to, fault grounds.<sup>20</sup> The introduction of "no fault" divorce was intended to reduce the animosity surrounding the divorce process, and to facilitate the resolution of issues arising from divorce, especially those related to children.<sup>21</sup> The divorce rate has risen sharply across North America, roughly corresponding with the introduction of no-fault divorce laws, and it has been argued that these legal reforms have caused, or at least contributed to, the increase in the rate of family breakdown. While adopting no-fault regimes facilitated the process of obtaining a divorce, there is real controversy about whether the adoption of a no-fault regime had any long term effects on rates of divorce and family breakdown. At

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17. Divorce and Matrimonial Causes Act, 1857, 20 & 21 Vict. c. 85. For a discussion of the controversy over the 1857 English reforms, see e.g., LAWRENCE STONE, ROAD TO DIVORCE : ENGLAND 1530–1987 (1990), and RODERICK PHILLIPS, PUTTING ASUNDER : A HISTORY OF DIVORCE IN WESTERN SOCIETY (1988).

18. For a history of Canadian divorce law, see D.C. MCKIE ET AL., DIVORCE: LAW AND THE FAMILY IN CANADA 24–38 (Statistics Canada 1983).

19. See LENORE J. WEITZMAN, THE DIVORCE REVOLUTION (1985).

20. See, e.g., SANFORD N. KATZ, FAMILY LAW IN AMERICA 78–86 (2003).

21. See, e.g., UNIF. MARRIAGE & DIVORCE ACT (amended 1973), 9A U.L.A. 160–162 (1998) (prefatory note).

worst, the adoption of a no-fault regime is weakly correlated with increases in long term divorce rates. Most if not all of the increase in divorce rates in North America is attributable to a complex interaction of social, cultural and economic factors. Perhaps the most important factor in the rise in the divorce rate is that families are having fewer children and women have much higher rates of employment than in the past, making women more willing to leave unhappy or abusive marriages.<sup>22</sup> While there are significant variations between jurisdictions in North America in divorce rates, these are a result of social, economic and cultural factors rather than differences in legal regimes.<sup>23</sup> Whatever the causes of the increase in the divorce rate, from a legal perspective, marriage is no longer viewed as indissoluble, and from a social perspective, divorce is now a common feature of North American family life. What is clear is that marriage in North America has changed dramatically, and those who get married have much less certainty that they will stay together until “death us do part.” However, divorce rates in the first decade of the millennium seem to be stabilizing and perhaps even declining, with about one marriage in two in the United States ending in divorce, and one marriage in three in Canada resulting in a divorce.<sup>24</sup>

Until the latter part of the 20th century, family law legislation everywhere was generally written in explicitly gendered terms. The law expected the husband to be employed, while the wife was regarded as a dependent caring for the home and children. Only a wife was eligible to seek spousal support at the end of a marriage, but she would generally forfeit this right if she committed adultery, thereby breaching one of the fundamental expectations of marriage. Throughout much of the 20th century, there was a strong presumption that after separation, children would be placed in the care of their mothers, unless the mother had violated the expectations for marriage by committing adultery.

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22. For a discussion of factors affecting divorce rates and a good review of the controversy over the effects of no fault divorce laws on divorce rates, see MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 153–158 (2000).

23. All jurisdictions in Canada have the same divorce law, but the divorce rate varies from twenty-two per 100 marriages in Newfoundland to forty-two per 100 marriages in Alberta. See STATISTICS CANADA, *Divorces*, THE DAILY, Mar. 9, 2005, at 2–3, available at <http://www.statcan.ca/Daily/English/050309/d050309b.htm>.

24. There is a degree of controversy and complexity about calculating the proportion of marriages that will end in divorce, though it is clear that Canada has a significantly lower divorce rate than the United States. For divorce rates in Canada, see <http://www.statcan.ca/Daily/English/050309/d050309b.htm> (last visited Jan. 28, 2006). For a discussion of U.S. divorce rates, see <http://www.divorcereform.org/rates.html> (last visited Jan. 28, 2006). For one international comparison of divorce rates, see [http://www.nationmaster.com/graph-T/peo\\_div\\_rat](http://www.nationmaster.com/graph-T/peo_div_rat) (last visited Aug. 18, 2005).



The laws of Canada and the United States have changed dramatically over the past fifty years, and marriage is now regarded as a “partnership of equals,” with a presumption in most jurisdictions that marital property will generally be shared, regardless of whose direct efforts resulted in the acquisition of specific assets. Laws no longer refer to “husbands” and “wives,” but are generally written in gender neutral terms, with, in theory, either partner being able to seek spousal support, though both spouses are also expected to take reasonable measures to be self-supporting after separation. Fathers and mothers are, in statutes, presumed to be equally capable of caring for their children. Unlike earlier family laws which had rigid expectations and in most jurisdictions refused to enforce marriage contracts, today, when marrying, spouses have significant autonomy to define their rights and obligations upon termination of their relationship. Spouses are viewed as legally equal. Gender roles in marriage are no longer *legally* prescribed.

Further, the link between the traditional marriage and parenthood has become attenuated. With improvements in birth control, the number of children per marriage has fallen dramatically over the past century in North America, and with rising infertility and changes in life choices being made by married women, a growing number of married couples are without children. There is also a growing social acceptance of single parenthood, and fewer children in North America are being raised in two parent families.<sup>25</sup> In Canada, all legal distinctions between children born in wedlock and out of wedlock (the formerly “illegitimate”) have been abolished, and in the United States these legal distinctions have largely disappeared. Further, with the development of artificial reproductive technology, same-sex couples are able to raise, from birth, children to whom one of the parents is biologically related. The view that marriage is inextricably intertwined with procreation no longer reflects social or legal reality.

With all of these changes in the nature of “traditional” marriage the virtual abolition of the concept of illegitimacy, the discarding of legally proscribed gender roles in marriage, and the advent of “no fault” divorce—it is understandable that the question of the legal recognition of same-sex relationships is arising now. It is more difficult to argue that marriage law should require two spouses of opposite gender if there are,

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25. For a description of some of the salient changes in family life in Canada over the past half century, including statistics on the decline in the number of children in two parent families, and the increase in the labor force participation of married women, see Kerry Daly, *Reframed Family Portraits*, TRANSITION MAG., Spring 2005, at 3–11, *available at* <http://www.vifamily.ca/library/transition/351/351.html>. For data and descriptions from a number of jurisdictions, including the United States, see THE BLACKWELL COMPANION TO THE SOCIOLOGY OF FAMILIES (Jacqueline Scott et al., eds. 2004).

in fact, no longer legally specified gender roles. At least for some married couples, there is growing ambiguity about their social and economic expectations for the roles of “husband” and “wife.” While many married couples continue to follow at least some traditional gender roles in terms of domestic responsibilities and employment, this is a matter of choice, not legal policy. It is not coincidental that those who oppose same-sex marriage and favor upholding the traditional legal definition of marriage are social conservatives, who also tend to support relatively traditional social and economic roles for husbands and wives within marriage.<sup>26</sup>

While there is generally only one legally operative definition of marriage within a jurisdiction at any time, different people in a jurisdiction may have very different social, spiritual, economic, and sexual expectations of marital relationship. Throughout North America, different married couples within the same jurisdiction have very different views about the appropriate roles within marriage. Some couples view marriage as a “partnership of equals,” with no role differentiation in terms of child care, household duties or labor force participation, while others may hold traditional patriarchal expectations for husband and wife, with the husband clearly the “head of the household,” and the wife having the role of home-maker.

### III. SETTING THE CONTEXT: NON-TRADITIONAL RELATIONSHIPS IN CANADA & THE UNITED STATES

Before discussing the legal recognition of same-sex relationships in Canada and the United States, it is valuable to consider how the laws in these two countries deal with other familial relationships that are formed outside of the traditional marital relationship. Canada has developed a relatively broad approach to the recognition of familial relationships that are based on neither marriage nor biological links, with particular regard towards opposite-sex adults in conjugal relationships, and parent-like relationships between adults and children who do not have a biological link.

Historically in Canada, as in the United States, there was great social opprobrium attached to adults who were “living in sin”—cohabiting without being married—and there was no legal recognition given to this type of relationship. Changing social mores in the 1960s and 1970s led to wider social acceptance of opposite-sex cohabitation outside of marriage

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26. See Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11 (2004); Appleton, *supra* note 8.

and an increase in the incidence of what is often referred to in Canada as “common-law marriage.”<sup>27</sup> By 2001, 14% of all Canadian opposite-sex couples residing together were unmarried, an increase from 6% in 1981.<sup>28</sup>

In 1972, British Columbia became the first province to recognize opposite-sex cohabitation for purposes of spousal support, extending the statutory definition of “spouse” for this purpose to include a person of the opposite sex if they “lived together as husband and wife” for at least two years.<sup>29</sup> Over the next twenty years almost every province enacted legislation giving limited recognition to unmarried opposite-sex partners for a range of legal purposes such as spousal support, dependent’s relief, and survivor’s tort claims.

In a series of decisions starting in 1980,<sup>30</sup> the Supreme Court of Canada held that property claims between unmarried partners could be made based on constructive trust doctrine, with the proportion of entitlement determined according to the amount of the contribution to the acquisition or maintenance of property. In 1993, the Supreme Court held that in long term relationships, contributions to household management and child care can be the basis of a claim of unjust enrichment,<sup>31</sup> and the remedy to recognize this claim could include a claim by one partner to a division of property owned by the other partner before the relationship commenced. The Court ruled that there is no duty for a common-law partner to provide domestic services, and therefore, there should be some form of compensation when the relationship ends.

In its 1995 decision *Miron v. Trudel*,<sup>32</sup> the Supreme Court held that for some legal purposes, legislatures are obliged under the Equality Rights provision of section 15 of the Canadian Charter of Rights and Freedoms to give long term opposite-sex common law partners the same rights as legally married persons. In *Miron*, the Court held that for the purposes of claiming benefits under an insurance policy, a long term unmarried partner was to be treated as a “spouse,” with the same rights

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27. In Canada, the term “common-law marriage” is often used to describe an opposite-sex conjugal relationship where the parties cohabit but are not legally married. The term “common law marriage” has a different meaning in the United States, where in twelve states parties can effect a legal marriage “at common-law” without following the statutorily required ceremonial and registration requirements for marriage by cohabiting and “holding themselves out as husband and wife[.]” See Katz, *supra* note 18, at 23–26.

28. STATISTICS CANADA, PROFILE OF CANADIAN FAMILIES AND HOUSEHOLDS: DIVERSIFICATION CONTINUES at 3 (2002), available at <http://www12.statcan.ca/english/census01/products/analytic/companion/fam/pdf/96F0030XIE2001003.pdf>, (last visited Jan. 28, 2006).

29. Family Relations Act, S.B.C. 1972, ch. 20, § 15(e)(iii).

30. Pettkus v. Backer, [1980] 2 S.C.R. 834.

31. Peter v. Beblow, [1993] 1 S.C.R. 980.

32. [1995] 2 S.C.R. 418.

as a married partner. However, in its 2002 decision in *Nova Scotia (Attorney General) v. Walsh*,<sup>33</sup> the Supreme Court ruled that since unmarried opposite-sex partners have “chosen” not to marry, it is not discriminatory to deny them rights as against each other under provincial marital property laws. As a result of these decisions and consequent legislative reforms, in most provinces unmarried partners are treated differently than their married counterparts. For example, unmarried partners are denied access to some of the statutory rights that married partners have in regard to the marital home. Additionally, they do not have the benefit of the statutory presumption of sharing the marital property, but rather must prove entitlement based on contribution using constructive trust or unjust enrichment doctrine.<sup>34</sup>

There is now some variation between provinces in the rights and obligations of common law opposite-sex couples, as well as variation within provinces in the operative legal definitions, but in a broad sense, unmarried opposite-sex relationships in Canada can be characterized as “marriage-lite.” After a period of cohabitation, unmarried partners have an imposed or ascribed status that has many, but not all, of the legal attributes of marriage. With the exception of those living in Quebec, those who live together in a conjugal relationship without marrying, after a period of cohabitation, acquire the rights and obligations, for most legal purposes, of those who choose to marry.<sup>35</sup> The period of cohabitation varies with the jurisdiction and purpose, from any period to as long as five years. In Quebec, with its civilian traditions, rights and obligation generally arise only if partners have registered their relationship, or if there has been some contribution to the acquisition of assets. However,

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33. [2002] 4 S.C.R. 325.

34. In Manitoba and Saskatchewan legislation was enacted to give long term cohabitants the same rights in regard to marital property as the married: Manitoba, three years cohabitation, applies to same and opposite-sex partners; The Common-Law Partners’ Property and Related Amendments Act, S.M. 2002, ch. 48, § 16; Saskatchewan three years cohabitation; The Matrimonial Property Act, 1997, § 2(1), as enacted by The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2), S.S. 2001, ch. 51, § 8(5). This legislative action in Manitoba and Saskatchewan was partly prompted by litigation between unmarried opposite-sex partners and same-sex partners elsewhere in Canada.

35. Conjugal—living together in a spousal relationship—is not defined in exclusively sexual terms, though a sexual relationship is almost always an important element of conjuality. Conjuality is established by a combination of the sharing of economic, social and emotional lives. The Supreme Court of Canada has held that the characteristics of a “conjugal” relationship include “shared shelter, sexual and personal behavior, services, social activities, economic support and children, as well as the societal perception of the couple.” A couple does not necessarily have to satisfy all of these elements to be living in a conjugal relationship. *M. v. H.*, [1999] 2 S.C.R. 3. It is now accepted in Canada that same-sex partners can live in a “conjugal” relationship. See *Ross v. Reaney*, [2003] O.J. No. 2366 for a case where the court discussed the meaning of “conjugal” in a homosexual relationship and awarded interim spousal support at the end a conjugal same-sex relationship.

even in Quebec, for such federal purposes as income tax, “spousal status” arises after one year’s cohabitation—even without registration. Non-marital couples are increasingly making cohabitation agreements to regulate their affairs, and these contracts have statutory recognition in all Canadian jurisdictions, though their use is still not widespread.

This legal recognition of unmarried opposite-sex relationships in Canada offers protection to those who live in these relationships and are most vulnerable (i.e., usually women and their children), but it also has the effect of reducing the burden that the state might otherwise have in providing support through social assistance. While non-marital opposite-sex relationships often have many of the social, economic, and emotional characteristics of legal marriages, these relationships are characterized by higher rates of breakdown<sup>36</sup> and domestic violence.<sup>37</sup> Failing to provide legal recognition and protection to those who are vulnerable in these relationships, however, would do nothing to promote familial stability or address issues like the relatively high rates of abuse in non-marital relationships. Indeed, it is important to recognize these relationships, so that full legal protections can be afforded to those who live in them. It is significant to note that Quebec, which has the least legal recognition of non-marital opposite-sex relationships, also has by far the highest rate of cohabitation in Canada,<sup>38</sup> suggesting that denial of recognition does not discourage this type of relationship. Lack of legal recognition simply leaves those who may be vulnerable with less legal protection.

In the United States there is significant variation between states in the legal treatment of unmarried opposite-sex cohabitants, but in general there is significantly less legal recognition of these relationships than in Canada. While the 1976 California decision *Marvin v. Marvin*<sup>39</sup> recognized that, in theory, an unmarried partner can raise a property claim based on an express or implied contract in the absence of a written cohabitation agreement (which is rare), courts have generally been reluctant to find an agreement.<sup>40</sup> In some states, like Illinois, the courts have refused to enforce agreements between non-marital partners.<sup>41</sup> In a few states, the courts have given long-term, non-marital, opposite-sex

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36. See, e.g., Zheng Wu, *Cohabitation: An Alternative Form of Family Living* (Oxford University Press, 2000).

37. See, e.g., Statistics Canada, *Family Violence in Canada: A Statistical Profile 2005* (Ottawa 2005).

38. See STATISTICS CANADA, *supra* note 26.

39. 557 P.2d 106 (Cal. 1976).

40. See, e.g., *Marvin v. Marvin*, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981); and *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980) (rejecting implied contract concept; only express agreements between cohabitants are enforceable in New York).

41. *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

partners property rights similar to marriage rights, and some states allow for these partners to enter registered domestic partnerships to gain some of the rights and obligations of marriage.<sup>42</sup> No state, however, imposes rights and obligations upon the unmarried in the way that is common in Canada, leaving American women who cohabit outside of marriage with much less protection than is afforded to women in Canada who live in this type of familial relationship.

The United States also has fewer couples living in non-marital relationships, with only 8% of opposite-sex couples living outside of marriage compared to 14% in Canada.<sup>43</sup> The higher rate of marriage in the United States may provide a partial explanation for the higher divorce rate. In Canada, those who are likely to separate may be more likely to cohabit and separate, while in the United States they are more likely to marry, but also more likely to then divorce.

Canadian law accepts that children may develop psychologically profound relationships with adult care-givers who come to stand in the place of parents, and the protection of the interests of children may require the recognition of these relationships. The Supreme Court of Canada has accepted that if persons other than biological parents become caregivers for a child, a dispute over the custody of the child should be resolved on the basis of the “best interests” of the child, without a legal presumption in favor of the biological parents.<sup>44</sup> Legislation in Canada recognizes that those who have come to develop a parent-like relationship with a child should have the rights and obligations of a parent. For example, section 2(2) of the Divorce Act provides a definition of “child of the marriage,” which includes any child for whom one “stands in the place of a parent,” and imposes a child support obligation on these individuals, and gives them the right to seek custody or access in accordance with the best interests of the child. The Supreme Court of Canada has held that once a step-parent or other person has established a “parental relationship” with the child, the support obligation is established and it cannot be revoked.<sup>45</sup> Until recently, these provisions were most commonly used to give rights and impose obligations on step-parents in marriages. They also give parental status to same-sex partners of biological parents, even after separation from the biological parent, provided that a meaningful parental role has been

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42. See JOHN GREGORY ET AL., UNDERSTANDING FAMILY LAW 22–31 (Lexis Nexis 2d ed. 2001).

43. See *Divorce Declining, but so is Marriage*, USA TODAY, July 18, 2005.

44. See, e.g., *King v. Low*, [1985] 1 S.C.R. 87. See also *Catholic Children's Aid Society v. M.(C.)*, [1994] 2 S.C.R.165.

45. *Chartier v. Chartier*, [1999] 1 S.C.R. 242.

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established during cohabitation.<sup>46</sup>

Traditionally, in the United States there has been little legal recognition given to those who have assumed a parent-like role for children, while a strong priority was given to the rights of biological parents. American law has tended to have strong presumption in favor of the claims of biological parents, with some cases indicating that the constitutional rights of biological parents can take precedence to having courts make decisions about children based on an assessment of the best interests of the child.<sup>47</sup> Historically, the main effect of this approach was to limit the rights and obligations of step-parents, and to allow biological parents who were not clearly unfit to regain custody of children from long time care-givers who had become “de facto” or “psychological parents.”

The aforementioned approach has also resulted in the partners of lesbian biological parents having no rights or obligations in regard to children for whom they had a parental role. For example, in a 1991 decision the California Court of Appeal denied any status to a lesbian whose partner conceived two children by artificial insemination during their relationship, even though the woman had a parental role for the children since birth. The court refused to assess whether it was in the interests of the children to have visitation with the woman after she separated from the biological parent, dismissing the claim without an adjudication on the merits.<sup>48</sup> More recently, however, courts in a number of states, including California, have begun to use the “intended parent” concept to allow lesbian partners of biological mothers to have full parental rights and obligations. Both the child and society have a strong interest in recognizing the reality of these relationships, as the California Supreme Court acknowledged in its recent ruling in *Elisa B. v. Emily B.*,

[W]e perceive no reason why both parents of a child cannot be women . . . the Legislature implicitly recognized the value of having two parents, rather than one, as a source of both emotional and financial support, especially when the obligation to support the child would otherwise fall to the public.<sup>49</sup>

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46. See, e.g., *Buist v. Greaves*, [1997] O.J. No. 2646 (Gen. Div.).

47. See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000); see also GREGORY ET AL., *supra* note 40, at 466–478.

48. *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Cal Ct. App. 1991).

49. *Elisa B. v. Emily B.*, 33 Cal. Rptr. 3d 46 (Cal. 2005); see Adam Liptak, *California Ruling Expands Same-Sex Parental Rights*, N. Y. TIMES LATE EDITION, Aug. 23, 2005 at 10. Courts in Maine, Maryland, Massachusetts, New Jersey, Pennsylvania, Rhode Island, and Wisconsin have taken a similar approach to recognition of rights of lesbian partners of biological mothers. See [http://www.glad.org/News\\_Room/press71-4-7-04.shtml](http://www.glad.org/News_Room/press71-4-7-04.shtml) (last visited Aug. 27, 2005).

The approach of Canadian courts and legislatures to unmarried opposite-sex partners and relationships of children to psychological parents has recognized social, psychological and economic realities, protecting the interests of those who are dependent and vulnerable. The progress on these issues laid the ground work for a more flexible approach for the more recent recognition of same-sex relationships. It is easier for a society to begin to address issues with non-traditional families by focusing on such issues as promoting the welfare of children, remedying unjust enrichment and protecting those who are vulnerable. The recognition of same-sex relationships is likely to come only after less contentious issues. American laws have lagged behind those of Canada in terms of recognizing unmarried opposite-sex cohabitation and *de facto* parents, but it is significant that the laws about these issues are starting to change in the United States, especially as they relate to children. This may presage future changes in American laws related to same-sex relationships.

#### IV. RECOGNITION OF SAME-SEX RELATIONSHIPS IN CANADA

Throughout the world, and over much of human history, homosexuals were subjected to ridicule, harassment, discrimination and abuse, and in many countries, including Canada, they were subject to criminal prosecution. In the past half century, however, there have been dramatic changes in social and legal attitudes towards homosexuals in many countries, including Canada.

Participation in homosexual acts, such as anal intercourse, was a crime in Canada until 1969, when Parliament amended the Criminal Code to abolish these offenses.<sup>50</sup> In arguing for the decriminalization of consensual homosexual acts between adults, Pierre Trudeau, then the Justice Minister and later the Prime Minister, declared that “[t]he State has no place in the nation’s bedrooms.”<sup>51</sup> Starting in 1977, provincial legislatures in Canada began to amend their human rights codes to add a prohibition of discrimination on the basis of sexual orientation, for such purposes as, for example, employment.<sup>52</sup> After the introduction of the

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50. Criminal Law Amendment Act, 1968–1969 S.C., ch. 38, § 7 (Can.) (abolished the offense of “sodomy,” so that it was no longer a crime for consenting adults to engage in anal intercourse in private). For a fuller discussion of this change in the criminal law, see DONALD G. CASSWELL, *LESBIANS, GAY MEN, AND CANADIAN LAW* 108–14 (1996).

51. See JOHN ROBERT COLOMBO, *JOHN ROBERT COLOMBO’S FAMOUS LASTING WORDS: GREAT CANADIAN QUOTATIONS* 424 (2000).

52. Quebec was the first province to enact such a law. An Act to Amend the Charter of Human Rights and Freedoms, S.Q. 1977, ch. 6. Alberta, Canada’s most conservative province, still



Canadian Charter of Rights and Freedoms in 1982, most politicians and members of the Canadian public were prepared to accept that it was wrong to overtly discriminate against individuals on the basis of their sexual orientation in regard to such issues as employment. By the late 1980s, there was growing social acceptance of homosexuality, which resulted in more gay and lesbian partners openly cohabiting, especially in urban areas. The demand for legal recognition of same-sex relationships increased, and Canadian courts started to give limited recognition to these relationships for family law purposes. In 1986, for example, a British Columbia court held that a same-sex partner could use the constructive trust doctrine in the same way as an opposite-sex unmarried partner to make a claim to property acquired during a domestic relationship.<sup>53</sup>

Despite a growing consensus that overt discrimination against gays and lesbians would not be tolerated in Canadian society, homosexuals continued to face prejudice, as well as acts of violence perpetrated against them because of their sexual orientation. In the early 1990s, politicians and judges were still unwilling to accord familial rights or spousal status to same-sex partners. In 1993, an Ontario court dismissed a Charter challenge by a same-sex couple who argued that their constitutional rights had been violated when they were refused a marriage license.<sup>54</sup> The court ruled that since the common law definition of “marriage” was a union of “one man and one woman,” it was not discriminatory to preclude same-sex partners from marrying each other. One of the “principal purposes of the institution of marriage,” the court observed, was the procreation of children, which cannot be “achieved in a homosexual union,” concluding, “this reality that is recognized in the limitation of marriage to persons of the opposite sex.”<sup>55</sup>

In the mid 1990s, judicial attitudes began to change, though initially not in cases claiming full “marital” rights. In one 1997 Ontario case, for example, the court accepted that under provincial child support laws, which had been enacted to impose support obligations on step-parents, the lesbian partner of a child’s biological mother could have “parental” support rights and obligations as she had “demonstrated a settled intention” to treat the child as part of her family.<sup>56</sup>

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has not added sexual orientation as a prohibited ground, though the Supreme Court of Canada has “read in” this term to that province’s human rights code. *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

53. *Anderson v. Luoma*, [1986], 50 R.F.L.2d 127 (B.C.S.C.).

54. *Layland v. Ontario (Minister of Consumer & Commercial Relations)*, [1993] 14 O.R.3d 658.

55. *Id.* at 666.

56. *Buist v. Greaves*, [1997] O.J. 2646.

While the Canadian Charter of Rights and Freedoms does not explicitly prohibit discrimination on the basis of sexual orientation, section 15 of the Charter does provide that “[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination.” Section 15 enumerates certain prohibited grounds of discrimination, such race, religion, sex, age and mental or physical disability. In its 1995 decision in *Egan v. Canada*,<sup>57</sup> the Supreme Court of Canada considered a constitutionally based claim by long-term same-sex partners to “spousal” benefits under the old age pension legislation, which provided benefits to both long term opposite-sex cohabitants and married “spouses.” Although a majority of the Court did not accept that particular claim, the entire Court agreed that “[s]exual orientation is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs,”<sup>58</sup> and that accordingly “sexual orientation” should be treated as “analogous” to the “enumerated” prohibited grounds in section 15. Since *Egan*, sexual orientation has been accepted as a prohibited ground for discrimination under the Charter.

In 1999, the Supreme Court of Canada held that provincial family law legislation which permits partners in long-term opposite-sex relationships to seek “spousal” support at the end of their relationship violated section 15 of the Charter, discriminating against homosexuals by not affording them “spousal” status. Justice Cory, writing for a majority of the Court in *M. v. H.*,<sup>59</sup> emphasized the social importance of recognizing same-sex relationships:

The exclusion of same-sex partners from the benefits of [spousal support law] . . . promotes the view that . . . individuals in same-sex relationships . . . are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances.

. . . [T]he human dignity of individuals in same-sex relationships is violated by the impugned legislation.<sup>60</sup>

In *M. v. H.*, the Supreme Court was careful to observe that it was only ruling that it was discriminatory to deny same-sex conjugal partners the rights enjoyed by unmarried opposite-sex conjugal partners, and the

57. *Egan v. Canada*, [1995] 2 S.C.R. 513.

58. *Id.* at 514 (La Forest, J., writing for the full Court on this issue).

59. *M. v. H.*, [1999] 2 S.C.R. 3.

60. *Id.* at paras. 73–74 (emphasis added).

Court was not directly comparing same-sex partners to married opposite-sex couples. However, the Court's analysis and rhetoric clearly suggested that the Court would be sympathetic to a future argument that the failure to allow same-sex partners to marry is an affront to their "human dignity." The Court recognized in *M. v. H.* that "there is evidence to suggest that same-sex relationships are not typically characterized by the same economic and other inequalities which affect opposite-sex relationships,"<sup>61</sup> and thus these relationships will less frequently result in economic dependency and claims to spousal support. Nevertheless, the Court said:

[S]ame-sex couples will often form long, lasting, loving and intimate relationships.

... While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many ... "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal."<sup>62</sup>

In response to *M. v. H.*, the federal and provincial governments enacted legislation to give same-sex partners the same legal recognition as opposite-sex non-marital partners, based on a period of "conjugal cohabitation"<sup>63</sup> (e.g., generally one to three years depending on the jurisdiction). Nova Scotia, Manitoba, and Quebec went further by also enacting a registered domestic partnership law,<sup>64</sup> allowing unmarried conjugal partners, whether of the same or opposite-sex, to register and thereby gain some significant rights and obligations of married spouses, to the extent permitted by provincial law (i.e., for such purposes as marital property, support, and succession).

Canada has a complex division of jurisdiction over family law and marriage. Under section 91(26) of the Constitution Act, 1867, the federal Parliament has exclusive jurisdiction over "marriage and divorce," but under section 92(12) the "solemnization of marriage" is a matter of

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61. *Id.* at para. 110 (per Iacobucci, J.).

62. *Id.* at paras. 58–59, (per Cory, J.).

63. *See, e.g.*, Modernization of Benefits and Obligations Act, 2000 S.C., ch. 12 (Can.).

64. *See* Bill 75, An Act to Comply with Certain Court Decisions and to Modernize and Reform Laws in the Province, 1st Sess., 58th Leg., N. S., 2000 (3d Reading, 30 Nov. 2000). *See* The Common-Law Partners' Property and Related Amendments Act, 2002 S.M., ch. 48, § 23 (creating a registration scheme under the Vital Statistics Act); An Act Instituting Civil Unions and Establishing New Rules of Filiation, 2002 S.Q., ch. 6. For a fuller discussion of registered domestic partnerships in Canada, see Nicole LaViolette, *Waiting in a New Line at City Hall: Registered Partnerships as an Option for Relationship Recognition Reform in Canada*, 19 CAN. J. FAM. L. 115 (2002).

provincial and territorial jurisdiction. The federal Parliament has jurisdiction over the law of capacity to marry, which includes the basic definition of “marriage,” and the issue of whether same-sex partners can marry. For most of its history, Canada relied on the common law to define capacity to marry, including such issues as the law of physical capacity to consummate the marriage. The legal definition of marriage in Canada was long based on the 1866 English case of *Hyde v. Hyde*, that marriage is “the voluntary union . . . of one man and one woman to the exclusion of all others.”<sup>65</sup>

After *M. v. H.*, gays and lesbian seeking to marry began Charter-based challenges to this traditional legal definition, claiming that it discriminated against them on the basis of sexual orientation. In a number of decisions starting in 2002, lower courts in most jurisdictions in Canada recognized that it is a violation of the Charter to deny same-sex partners the right to marry. By early 2005, courts in eight provinces and two territories had issued such rulings. While each of these decisions applied the federal law governing marital capacity, each decision was only binding in the province or territory of the court that gave it. The first cases were thoroughly litigated, with the federal and provincial governments defending the traditional definition of marriage, but after the 2003 Ontario Court of Appeal judgment in *Halpern v. Canada (Attorney General)*,<sup>66</sup> the federal government announced that it would not appeal that decision to the Supreme Court of Canada, and the later cases were quickly resolved. There were no applications made to the courts in the remaining two provinces, Alberta and Prince Edward Island; which, perhaps not coincidentally, are among the most socially conservative in Canada. Same-sex marriage in those two jurisdictions awaited federal legislation.

The Ontario Court of Appeal decision in *Halpern* is the most frequently cited judgment in Canada on the constitutional right of same-sex partners to marry. On the importance of giving same-sex partners the right to marry, the Court of Appeal wrote:

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65. *Hyde v. Hyde*, [1866] L.R. 1 P. & D. 130, at 133.

66. *Halpern v. Canada (Attorney General)*, [2003] 65 O.R.3d 161. The highest appeal court in each Canadian province is called the Court of Appeal.

Marriage is . . . one of the most significant forms of personal relationships. For centuries, marriage has been a basic element of social organization in societies around the world. Through the institution of marriage, individuals can publicly express their love and commitment to each other. . . . This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.<sup>67</sup>

The Court of Appeal emphasized the importance of the "choice" that opposite-sex partners have when deciding whether to get married or only have the more limited rights and obligations which the law in Canada affords unmarried cohabitants based on a period of cohabitation. The Court of Appeal observed:

[M]arried couples have instant access to all benefits and obligations. . . . Same-sex couples are denied access because they are prohibited from marrying[.]  
. . . [S]ame-sex couples are excluded from a fundamental societal institution—marriage. The societal significance of marriage, and the corresponding benefits that are available only to married persons, cannot be overlooked. . . . Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships. In doing so, it offends the dignity of persons in same-sex relationships.<sup>68</sup>

In the course of these decisions, the courts had to consider what has been the strongest secular concern about same-sex marriage: that it may endanger the family and society. One commentator, for example, argued that there is "danger in taking the country down the path marked out by the Court . . . [which] would undermine . . . an institution so essential to the well-being of Canadians."<sup>69</sup> In rejecting this type of argument in *Halpern*, the Ontario Court of Appeal wrote:

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67. *Id.* at para. 5. The decision was a unanimous ruling by McMurtry C.J.O., MacPherson and Gillese JJ.A.

68. *Id.* at paras. 104–107.

69. Douglas Allen et al., *Don't Kiss Off Marriage*, THE GLOBE & MAIL (June 18, 2003). This statement was signed by a number of Canadian religious leaders, academics and lawyers. For a fuller critique of Canada's recognition of same-sex marriage, see DANIEL CERE & DOUGLAS FARROW, *DIVORCING MARRIAGE: UNVEILING THE DANGERS IN CANADA'S NEW SOCIAL EXPERIMENT* (McGill-Queen's Press 2004); and Stewart *supra* note 24. For a Canadian advocacy group that defends the traditional definition of marriage, see [www.defendmarriage.ca](http://www.defendmarriage.ca) (last visited Aug. 20, 2005).

We fail to see how the encouragement of procreation and childrearing is a pressing and substantial objective of maintaining marriage as an exclusively heterosexual institution. Heterosexual married couples will not stop having or raising children because same-sex couples are permitted to marry. Moreover, an increasing percentage of children are being born to and raised by same-sex couples.<sup>70</sup>

While the widespread legal and social recognition given to opposite-sex cohabitants in Canada may have contributed to the fall in the marriage rate, recognizing same-sex unions will not be likely to deter any heterosexual person from marrying or having children. Further, as acknowledged in *Halpern*, it is becoming more common for same-sex couples in Canada to have the care of children, conceived to one partner by artificial insemination, adopted by the couple, or born to one partner prior to entering the same-sex relationship; recognizing the relationship of these same-sex partners will promote the welfare of these children.

There is now a substantial body of social science literature concerning the impact on children of being raised by two homosexual partners (usually lesbians) as custodial parents. While there would undoubtedly be value in doing more research into parenting by homosexuals, especially by gay fathers who have not been the subject of much study, the existing research serves to alleviate fears that children who are raised by same-sex partners are worse off than children raised by opposite-sex parents. The existing studies reveal no significant differences between children raised by same-sex couples and opposite-sex couples in emotional or cognitive developmental outcomes or in terms of mental health.<sup>71</sup> As early as the mid-1970s, Canadian courts began to accept that lesbian mothers could be awarded custody after separation from heterosexual fathers. In 1976, one Canadian judge remarked that “the manner in which one fulfills one’s sexual needs does not relate to the abilities of being a good parent.”<sup>72</sup>

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70. *Halpern*, [2003] 65 O.R.3d 161 at para. 123.

71. For a detailed study of spousal behavior and parenting by homosexuals in Canada, see ANNE-MARIE AMBERTO, SAME-SEX COUPLES AND SAME-SEX PARENT FAMILIES: RELATIONSHIPS, PARENTING, AND ISSUES OF MARRIAGE (2005), available at <http://www.vifamily.ca/library/publications/samesexd.html> (last visited, Aug. 20, 2005). See also Judith Stacey & Timothy J. Biblarz, (How) Does the Sexual Orientation of Parents Matter? 66 AM. SOC. REV. 159 (Apr. 1, 2001), available at 2001 WLNR 208746 (last visited, Jan. 28, 2006); Stephen A. Newman, *The Use and Abuse of Social Science in the Same-Sex Marriage Debate*, 49 N.Y. L. Sch. L. Rev. 537 (2004). While there have been some relatively small differences in terms of sexual orientation of children raised in gay and lesbian households, there are likely genetic explanations for these differences.

72. K. v. K., [1976] 2 W.W.R. 462 at 465 (Alta. Prov. Ct.). See also *Bubis v. Jones*, [2000] 6 R.F.L.5th 83, 90 (Ont. Sup. Ct. 2000) (Quinn, J. stating, “[h]eterosexual parenting is not better than lesbian parenting—just different.”)

Although federal politicians could have left the issue of same-sex marriage to be resolved by the courts and allowed the different cases to proceed to the Supreme Court of Canada, there was intense pressure for Parliament to become involved in dealing with this issue. Social and religious conservatives were demanding action to protect the traditional definition of marriage, while gay and lesbian advocates, along with their liberal religious and civil liberties supporters, were advocating that the government abandon any appeals and enact legislation to permit same-sex marriage everywhere in the country.

In 2001, the federal Liberal government had responded to *M. v. H.* with the Modernization of Benefits and Obligations Act, which amended sixty-eight federal statutes to recognize as “common-law partners . . . two persons who are cohabiting in a conjugal relationship”<sup>73</sup> for at least one year. This extended to homosexual partners the same rights and obligations as were already afforded to unmarried opposite-sex partners for purposes such as federal income tax law and federal pension plan eligibility. At that time, however, the Liberal government also felt political pressure to reaffirm its commitment to the traditional definition of marriage. Thus, the federal statute specified that “[f]or greater certainty, the amendments . . . do not affect the meaning of the word ‘marriage,’ that is, the lawful union of one man and one woman to the exclusion of all others.”<sup>74</sup>

After the 2003 Ontario Court of Appeal decision in *Halpern*, federal politicians had a limited range of options. One was to appeal *Halpern* to the Supreme Court of Canada, but a growing number of court decisions<sup>75</sup> had concluded that the Charter requires recognition of same-sex marriage, and the outcome of an appeal seemed a foregone conclusion. Further, there was growing pressure within the Liberal government to *not* be seen to be taking an “anti-Charter” position. Although some politicians favored a “civil union” compromise, the court decisions had explicitly stated that any response which restricted “marriage” to opposite-sex partners and only allowed homosexuals to have a registered domestic partnership would violate section 15 of the Charter; separate

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73. 2000 S.C., ch. 12 § 2(3) (Can.) (emphasis added).

74. *Id.* § 1.1; see also Federal Law—Civil Law Harmonization Act, No. 1, 2001 S.C., ch. 4, § 5 (Can.) (marriage requires the free and enlightened consent of a man and a woman to be the spouse of the other).

75. See, e.g., *EGALE v. Canada*, [2003] 13 B.C.L.R. 1 (rendered a few weeks before *Halpern*). The British Columbia Court of Appeal also ruled that section 15 of the Charter was violated by denying same-sex partners the right to marry, but the decision received less attention because the Court initially suspended the granting of a remedy for two years in order to give Parliament time to act. That suspension was revoked after the *Halpern* decision was rendered by the Ontario Court of Appeal.

treatment of homosexual intimate unions was not equal treatment. Further, under section 92(12) of Canada's Constitution Act, responsibility for the "solemnization of marriage" (e.g., the form of ceremony, the appointment of celebrants, registration) is a provincial responsibility, so the federal Parliament could not enact legislation that dealt with registration as an alternative to a ceremony.

One federal option was to use the "Notwithstanding Clause" to preserve the traditional definition of marriage. Under Canada's Constitution, Parliament may override a Charter based right for a five year period by enacting ordinary legislation which explicitly invokes the "Notwithstanding Clause,"<sup>76</sup> thus permitting Parliament to effectively override Charter-based court decisions. This would allow Parliament to deny same-sex partners the right to marry. However, there is great reluctance to invoke this explicitly rights-denying constitutional provision, and it has never been used by the federal Parliament. Even conservative politicians opposed to same-sex marriage were reluctant to advocate using the "Notwithstanding Clause."

Within a week of the rendering of the Ontario Court of Appeal judgment in *Halpern*, the Prime Minister announced that the government was in principle supportive of same-sex marriage and it would not appeal the lower court decisions requiring recognition of same-sex marriage. However, reflecting the divisions over the issue, the government also decided that prior to having Parliament vote on legislation to allow same-sex couples to marry, a reference case would be brought before the Supreme Court of Canada to answer some questions about the constitutionality of the proposed law.<sup>77</sup>

In its December 2004 decision *Reference Re: Same-Sex Marriage*,<sup>78</sup> the Supreme Court answered the three least contentious questions posed by the federal government, making clear that the federal government could enact such a law and that no religious celebrant could be required to perform a marriage ceremony for a same-sex couple. This question was posed to reassure some of the critics of same-sex marriage, who raised the specter of clerics being forced to perform same-sex marriages—contrary to their faiths. This question is purely theoretical, as

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76. Charter of Rights, § 33. See discussion of Peter Hogg, *So, Where Do We Go From Here?*, THE GLOBE & MAIL, Dec.15, 2004 at A25; Open Letter to The Hon. Stephen Harper from Law Professors Regarding Same-Sex Marriage, available at <http://www.law.utoronto.ca/samesex/letter.html> (last visited June 15, 2005).

77. See, e.g., Janice Tibbetts, *Ottawa to Legalize Gay Marriage*, NAT'L POST, June 18, 2003 at A5. In Canada, the Supreme Court of Canada has original jurisdiction in dealing with constitutional questions that the federal government may choose to "refer" to the Court for answers; this is known as a "reference case." This is not done frequently.

78. [2004] 3 S.C.R. 698.



there have in fact been no cases of gays or lesbians in Canada seeking to compel a religious celebrant to perform a marriage ceremony.

Although answering three of the questions posed, the Supreme Court in *Reference* took the unusual step of declining to answer the most contentious question posed by the federal government; whether the Charter requires recognition of same-sex marriage. The Court reasoned that since the federal government had stated its intention to address the issue of same-sex marriage legislatively regardless of the Court's opinion, it should not answer a purely "hypothetical question." Arguably, the judges in the Supreme Court were reluctant to be seen as imposing a controversial law on the country, and preferred to let the politicians "take the heat." Despite declining to explicitly answer this question, the Supreme Court signaled its support for same-sex marriage, noting the importance of the "protection" of the rights already acquired by same-sex partners who had married after *Halpern* and similar decisions in other jurisdictions in Canada.

By the time of the Supreme Court *Reference*, Prime Minister Martin came to view same-sex marriage as a human rights issue, and the government brought the Civil Marriage Act (Bill C-38) to Parliament in February, 2005, to define a "civil marriage" as "the lawful union of two persons to the exclusion of all others."<sup>79</sup> In the spring of 2005, there was intense lobbying of members of Parliament over same-sex marriage, with demonstrations, advertising and letter writing campaigns. Much of the anti-same-sex marriage advocacy was undertaken by conservative, faith-based groups, including the prominent American Christian organization Focus on the Family.<sup>80</sup> More liberal faith groups and civil liberties organizations supported changing the definition of marriage to allow same-sex partners to marry. There were Parliamentary Committee hearings and extensive media debates over same-sex marriage. Although no party had a majority in Parliament, and some Members of Parliament in the governing Liberal Party opposed same-sex marriage, an even larger number of opposition MP's supported Bill C-38, and it was passed by the House of Commons by a vote of 158 to 133 on June 28, 2005.<sup>81</sup> The new marriage law came into force on July 20, 2005, after passage by the Senate.

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79. Bill C-38, § 2, 38th Parliament, 1st Sess. (3d Reading, June 28, 2005.).

80. See, e.g., Oliver Moore, *Tory Same-Sex Motion Rejected*, THE GLOBE & MAIL, Apr. 12, 2005; Peter Kuitenbrouwer, *Faiths Join Ranks at Rally for Traditional Marriage*, NAT'L POST, May 24, 2005, at A1; Melissa Leong, *Muslim, Christian Groups Oppose Gay Marriage*, NAT'L POST, Apr. 5, 2005, at A5; and Tim Naumetz, *House Order May End Debate on Same-Sex Bill*, NAT'L POST, May 30, 2005, at A4.

81. Tim Naumetz, *For Better or Worse: Same-Sex Marriage Law Passes Commons*, NAT'L POST, June 29, 2005, at A1.

In order to ensure that religious supporters of the traditional definition of marriage would not be penalized, an amendment was added to Bill C-38 before it was enacted. The amendment specifies that no religious body shall lose its charitable status under the Income Tax Act because it refuses to perform same-sex marriages.<sup>82</sup> Bill C-38 was also carefully drafted to use the term “civil marriage.” While a registered religious celebrant may perform a faith-based same-sex marriage ceremony that will have the same effect as a legal marriage, a religious celebrant is also free to refuse to perform such a ceremony.<sup>83</sup>

The largest opposition party in Parliament at that time, the Conservatives, almost all voted against Bill C-38, and Party leader Stephen Harper pledged that if elected Prime Minister, he would bring back the issue of same-sex marriage to Parliament for another “free vote.” In the January 2006 federal election, the Conservatives won enough seats to form a minority government, and Stephen Harper, who is now Prime Minister, has stated that he will bring back the issue of restricting the definition of marriage to a man and a woman. However, a majority of Canadians now accept same-sex marriage, and surveys of newly elected Members of Parliament clearly indicate that a majority in Parliament will not vote to reverse the earlier legislative decision.<sup>84</sup> Further, given the Charter-based court decisions on this issue and the apparent unwillingness of the Conservatives to invoke the Notwithstanding Clause, which even the opponents of same-sex marriage are reluctant to advocate, there is no effective way to end same-sex marriage in Canada.

Same-sex marriage has been very controversial in Canada, though a number of public opinion polls have shown that a clear, but narrow majority of Canadians support same-sex marriage, with greater support amongst the young and urban voters. As a result of constitutional litigation, the Canadian courts prodded reluctant politicians to take action on a controversial issue, but the position of the courts and the politicians

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82. Bill C-38, § 11.1, 38th Parliament, 1st Sess. (3d Reading, June 28, 2005).

83. Depending on provincial law or policy, civil officials who perform marriages may be required to perform same-sex wedding ceremonies. In a number of provinces, government policy accommodates marriage commissioners who refuse to perform such same-sex marriage ceremonies. However, in Newfoundland, Manitoba and Saskatchewan, marriage commissioners who refuse to perform such ceremonies have been dismissed; this is the subject of a human rights complaint in Saskatchewan based on discrimination based on religion. See Gloria Galloway, *Refused Gays Rites, Marriage Official Expects To Get Axe*, THE GLOBE & MAIL, July 19, 2005, at A4.

84. See *Same-sex Vote Likely to be Tight*, THE GLOBE & MAIL, Feb. 1, 2006, at A1 (reporting on a survey revealing that a clear, but narrow majority of MPs would vote to retain same-sex marriage); see also Don Martin, *The Wit and Wisdom of a Candid John Crosbie*, NAT'L POST, Aug. 18, 2005, at A12 (offering an explanation of why even conservatives are questioning the political wisdom of attempting to reopen the same-sex marriage issue).

was consistent with the views of a majority of Canadians.<sup>85</sup> The introduction of same-sex marriage in Canada has been motivated by a desire to respect the equality and human dignity of all Canadians, and in particular to recognize the social and emotional importance of the conjugal relationships of homosexuals. This development also has considerable social value, as it promotes the interests of children who are being parented by same-sex partners, and it shifts some burdens which might otherwise fall on the state onto private shoulders.

The practical effects of the recognition of same-sex marriage were limited. Same-sex partners who cohabit in a conjugal relationship already had many of the rights and obligations of married partners. Whether they are married or have the status of a cohabiting couple, same-sex partners are much less likely to have children and more likely to have an egalitarian relationship than opposite-sex partners.<sup>86</sup> Hence, there is less likely to be the sort of dependency that could, for example, give rise to a claim for spousal support if the relationship breaks down. Further, it is clear that for a variety of social, psychological, and legal reasons, only a minority of homosexuals in long-term relationships will exercise the right to marry in the foreseeable future.<sup>87</sup> Nevertheless, the recognition of same-sex marriage is of profound symbolic significance, both for advocates and opponents.<sup>88</sup> The court decisions about same-sex marriage and the ultimate government response recognize the fundamental right of gays and lesbians to full equality under the law and provide important social validation of these relationships.<sup>89</sup> For opponents of same-sex

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85. It would appear that some politicians in the United States, such as California's Governor Schwarzenegger, would also prefer to have the courts make decisions about such controversial issues. See Dean E. Murphy, *Schwarzenegger to Veto Same-Sex Marriage Bill*, N.Y. TIMES, Sept. 7, 2005, at A18.

86. See *Ross v. Reaney*, [2003] O.J. No. 2366 (Ont. Sup. Ct.) (court awarded interim spousal support at the end of a conjugal same-sex relationship).

87. It is estimated that over 4000 same-sex marriages were performed in Canada by the spring of 2005 (females outnumbering males by a ratio of about 2:1). This is only a small fraction of the gays and lesbians in those two provinces in long term relationships who might have chosen to marry, and as many as one third of those who married are from outside of Canada, primarily the United States. Since a number of provinces are not keeping track of same-sex versus opposite-sex marriages, there will not be accurate national statistics on the number of same-sex marriages in Canada until the 2006 census data. See, e.g., *Naumetz*, *supra* note 2.

88. See, e.g., Didi Herman, *Are We Family?: Lesbian Rights and Women's Liberation*, 28 OSGOODE HALL L.J. 789, 797 (1990) (a Canadian lesbian scholar, argues that the recognition of same-sex "marriage" may "support . . . the very institutional structures that perpetuate and create women's oppression. Our reliance on the language of monogamy, cohabitation, life-long commitment and other essentials of bona fide heterosexual coupledness may divide us"). More social research into gay and lesbian family behaviors is needed; as social attitudes and legal rules change, it is likely that homosexuals will be more willing to be candid with researchers and that some of these patterns of behavior may change as well.

89. See, e.g., Ron Levy, *Expressive Harms and the Strands of Charter Equality: Drawing Out Parallel Coherent Approaches to Discrimination*, 40 ALTA. L. REV. 393 (2002).

marriage, most of whom are older or more conservative, the issue brings to the surface concerns about social change and a decline in the influence of traditional mores in Canadian society.<sup>90</sup>

Although same-sex partners were historically denied the rights and obligations of marriage, the denial of the psychological, social, economic, and legal benefits of marriage has now been recognized by the courts as a violation of “human dignity” under section 15 of the Charter. While there are differences between “typical” same-sex and opposite-sex conjugal relationships, same-sex conjugal relationships serve profoundly important social, psychological, spiritual, and economic functions, and it is now accepted in Canada that they merit the same legal recognition as opposite-sex conjugal relationships.

#### V. RECOGNITION OF SAME-SEX RELATIONSHIPS IN THE UNITED STATES

Historically, homosexuals very likely faced similar levels of discrimination and social hostility in Canada as in the United States, but over the past decade, gays and lesbians in the United States have had greater difficulty in gaining legal recognition for their relationships. Even in the United States, however, there has been very significant legal change over the past decade.

Canada’s Parliament repealed in 1969 its criminal laws making homosexual acts between consenting adults an offense, but in 1986, the United States Supreme Court in *Bowers v. Hardwick* upheld the constitutional validity of a Georgia statute which made sodomy an offense.<sup>91</sup> At that time, about half of the states made engaging in homosexual acts a criminal offense. While a number of states repealed these laws in the following years, in 2003, when the United States Supreme Court decided to overrule *Bowers*, more than a dozen states still retained these highly discriminatory statutes. In its 2003 decision in *Lawrence v. Texas*,<sup>92</sup> the majority of the Supreme Court held that the Texas “Homosexual Conduct” law was unconstitutional as a violation of the Due Process Clause of the Fourteenth Amendment. Justice Kennedy held that the “liberty interest” encompasses a number of freedoms, including freedom of adults to engage in intimate sexual conduct in their homes. He held that the Fourteenth Amendment protects against “unwarranted government intrusions” into the home, observing that the state laws being challenged sought to control “the most private human

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90. See, e.g., Matthew Mendelson, *Same-Sex Solitudes*, THE GLOBE & MAIL, Aug. 23, 2003, at A17.

91. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

92. *Lawrence v. Texas*, 539 U.S. 558 (2003).

conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”<sup>93</sup> Justice Kennedy was careful to limit the decision to the criminal context. However, in his dissent Justice Scalia noted the Ontario Court of Appeal decision in *Halpern*, decided just a few weeks before, and observed that the reasoning of the majority “leaves on pretty shaky grounds state laws limiting marriage to opposite sex couples.”

While in Canada the federal government has primary jurisdiction over the same-sex marriage issue and much of family law, in the United States most family law matters and the recognition of same-sex marriage are dealt with at the state level, often in the context of state constitutions. There are significant similarities in the state constitutions in their general articulation of protections for liberty and equality (and indeed between those statements and the words of Canada’s Charter of Rights), but generally, each state supreme court is the final arbiter of that state’s constitution, and different courts may give very different interpretations to similar words. Further, as discussed below, a number of state constitutions have recently been amended by referenda to explicitly prohibit same-sex marriage.

The first constitutional challenges in the United States to the traditional definition of marriage date to the 1970s,<sup>94</sup> but it was only in 1996 that any of these challenges were successful. In 1996, a Hawaii trial court held that denying same-sex couples the right to marry violated the state constitution because it discriminated on the basis of sex.<sup>95</sup> Before an appeal could be completed, the voters of Hawaii passed a state constitutional amendment to allow the state legislature to limit marriage to opposite-sex couples. There was a similar, later development in Alaska where a trial court held that the exclusion of same-sex couples from the right to marry violated the state constitution’s provisions assuring a right to privacy and the right to be free from discrimination on the basis of sex,<sup>96</sup> but as in Hawaii, the Alaska constitution was amended in a referendum to define marriage as the union of one man and one woman, ending that legal challenge.

After these challenges to the traditional definition of marriage, and with growing concerns about the possible response of “activist judges” to

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93. *Id.* at 567.

94. *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

95. *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

96. *Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

future challenges, in 1996, the United States Congress enacted the Defense of Marriage Act (DOMA).<sup>97</sup> This law provides that for all purposes of federal law, “marriage” means “a legal union between one man and one woman.” This limits the practical effect of any state decisions recognizing same-sex marriage, as it means that for such purposes as federal income tax, immigration, and social security, these marriages will not be recognized. Further, DOMA is intended to reaffirm the power of states to make their own decisions about the meaning of marriage within their state, providing that no state “shall be required” to give legal effect to a same-sex marriage entered into in another state. This law was passed by wide margins in Congress, which gives an indication of the views of a majority of politicians in the United States about same-sex marriage. However, there are concerns about the constitutionality of this federal law, as there are arguments that it infringes state jurisdiction over family law and may be inconsistent with the Full Faith and Credit Clause of the U.S. Constitution, which requires recognition by the courts of judgments rendered in other states.<sup>98</sup> As a result of these concerns, some conservative politicians, including President Bush, are calling for a Federal Marriage Protection Amendment to the United States Constitution to “protect marriage in America”<sup>99</sup> by having a constitutional provision that would be similar to DOMA, though at present there does not seem to be sufficient political support to adopt such an amendment.

In 1999, in *Baker v. State*, the Vermont Supreme Court held that the state’s failure to provide committed same-sex partners with the benefits and privileges granted to married couples violated the Common Benefits Clause of the Vermont State Constitution (a provision similar to the Equal Protection Clause in the U.S. Constitution and to the Equality Provision in section 15 of Canada’s Charter).<sup>100</sup> The Vermont Supreme Court cited some of the Canadian jurisprudence, and directed the state legislature to remedy this constitutional infringement, though allowing the legislature to decide whether to create an equivalent institution to marriage or allow same-sex partners to marry. In response to the Court’s decision, the Vermont legislature enacted a law permitting same-sex couples to enter into “civil unions,” which give same-sex partners who register all of the rights and obligations of married persons under state

97. Pub. L. No.104-199, 100 Stat. 2419 (1996) (codified at 28 U.S.C. § 1738C (1997)).

98. See, e.g., Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684 (2004).

99. See George W. Bush, *President Calls for Constitutional Amendment Protecting Marriage*, Feb. 24, 2004, <http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html> (last visited June 10, 2005) (statements of President Bush about need for a constitutional amendment).

100. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

law, such as rights upon separation. Further, third parties, like businesses, are required to treat marriages and civil unions equally. However, persons in a civil union are not granted any of the rights and responsibilities of marriage under federal law.

In November 2003, the Massachusetts Supreme Judicial Court held in *Goodridge v. Department of Public Health*, in a four to three split decision, that denying marriage and its protections to same-sex couples violates the Equality and Liberty provisions of the Massachusetts State Constitution.<sup>101</sup> The court mainly discussed American jurisprudence, but it also cited some of the Canadian same-sex marriage decisions, including *Halpern*, and concluded:

The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. . . . Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.<sup>102</sup>

The court construed “civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others,” and gave the legislature eighty days to comply with the ruling.

In January 2004, the Massachusetts State Senate asked the Supreme Judicial Court whether a law allowing same-sex couples to enter into civil unions would comply with the court’s opinion in *Goodridge*. The court rendered an advisory opinion making clear that civil unions would not provide full equality to same-sex couples as mandated by the Massachusetts constitution. The court stated that having a separate institution for same-sex couples would compound, not correct, the constitutional infirmity. The court wrote that establishing a separate “civil union” status for same-sex couples “would have the effect of maintaining and fostering a stigma of exclusion that the [Massachusetts] Constitution prohibits.”<sup>103</sup> The state of Massachusetts began granting marriage licenses to same-sex couples on May 17, 2004, though these

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101. *Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941, 968 (Mass. 2003).

102. *Id.*

103. *Opinions of the Justices to the Senate*, 802 N.E.2d 565, 570 (Mass. 2004).

same-sex marriages are not recognized for purposes of federal law.

After *Goodridge*, challenges by same-sex partners claiming a violation of state constitutions as a result of denial of their right to marry failed in Arizona and Indiana. In California, Connecticut, Florida, Maryland, New Jersey, New York, and Washington, similar cases based on claims under state constitutions are proceeding through the courts.<sup>104</sup> Although in one case a New York state trial judge initially ruled in favor of the same-sex partner applicants, the ruling was later reversed by the Appellate Division, and two other judges in the same state have also ruled against the applicants.<sup>105</sup> In June 2005, an intermediate state appeal court in New Jersey rejected a claim by same-sex partners seeking the right to marry, summarizing many of the arguments that have been used to reject these claims:

[P]laintiffs have failed to identify any source in the text of the New Jersey Constitution, the history of the institution of marriage or contemporary social standards for their claim that the Constitution mandates State recognition of marriage between members of the same sex. . . . [O]ur society and laws view marriage as something more than just State recognition of a committed relationship between two adults. Our leading religions view marriage as a union of men and women recognized by God, . . . and our society considers marriage between a man and woman to play a vital role in propagating the species and in providing the ideal environment for raising children.<sup>106</sup>

It will likely take many months before any of these cases reach their state supreme courts, but it is far from certain that the success of gay and lesbian advocates in Massachusetts and Vermont will be repeated in other states.

It is not surprising that the two state supreme courts which have been most receptive to claims by gays and lesbians of the right to marry have been in two of the most liberal states, Vermont and Massachusetts, and even there, the decisions were controversial. It is interesting to observe that in Massachusetts, immediately after the *Goodridge* decision was

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104. These cases and similar developments are tracked on a number of websites. See, e.g., [http://www.nclrights.org/publications/marriage\\_equality0305.htm](http://www.nclrights.org/publications/marriage_equality0305.htm) (National Centre for Lesbian Rights) and <http://www.lambdalegal.org/cgi-bin/iowa/issues/record2?record=9> (Lambda Legal).

105. *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005) *rev'd*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005). For other decisions dismissing applications, see *Seymour v. Holcomb*, 790 N.Y.S.2d 858 (N.Y. Sup. Ct. 2005); *Kane v. Marsolais*, RJI#01-04-ST4671, (N.Y. Sup. Ct. Jan. 2005), available at <http://www.nycourts.gov/press/KAN4SAME%20SEX%20DECISION.pdf> (last visited Jan. 30, 2005), *aff'd* 2006 N.Y. slip op. 01214 (N.Y. App. Div. Feb 16, 2006); and *Shields v. Madigan*, 783 N.Y.S.2d 270, (N.Y. Sup. Ct. 2004).

106. *Lewis v. Harris*, 875 A.2d 259, 268–69 (N.J. Super. Ct. App. Div. 2005).



rendered, state politicians opposed to the ruling began the process of trying to have the state constitution amended to prevent same-sex marriage. However, since the decision has been in effect, support for same-sex marriage has increased markedly in the state,<sup>107</sup> and the efforts to amend the Massachusetts state Constitution to ban same-sex marriage may be stalling.<sup>108</sup>

Conservative and religious political groups are much more powerful in the United States<sup>109</sup> than in Canada, and these groups have mobilized to oppose same-sex marriage, and the “judicial activism” that might lead to its imposition. In eighteen states, referenda have been held to amend their state constitutions to prohibit same-sex marriage. The votes against the recognition of same-sex marriage have passed by wide margins, and the process of constitutional change has been commenced in at least a dozen other states.<sup>110</sup> The fact that a state constitution has been amended to reaffirm that marriage is defined as the “union of a man and a woman” or to prevent courts from recognizing out of state same-sex marriages makes it more difficult for advocates to succeed in gaining same-sex marriage either through litigation or by the process of having legislation enacted. The wording and nature of these constitutional provisions varies, however, and in Nebraska it was possible to persuade a federal court to have a voter ratified amendment to a state constitution struck down for violating the U.S. Constitution, as being so broad and destructive of rights as to violate the federal Constitution’s Equal Protection guarantees and hence was invalid.<sup>111</sup>

In California, a 2000 amendment to the state constitution which provided that the state would only “recognize” marriages between a man and a woman has not prevented constitutional litigation to achieve same-sex marriage within the state or efforts to have the state Legislature amend the state family law code to define marriage as between “two persons,” as it is being argued that the amendment only bans recognition

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107. Support for same-sex marriage in Massachusetts increased from 40% at the time that the decision was rendered to 62% a year and a half later. National Gay and Lesbian Task Force, *Recent State Polls on Same-Sex Marriage & Civil Unions*, 5–7, <http://www.thetaskforce.org/downloads/RecentStateMay2005.pdf> (last visited Aug. 20, 2005).

108. See, e.g., Pam Belluck, *Massachusetts Rejects Bill to Eliminate Gay Marriage*, N.Y. TIMES, Sept. 15, 2005, at A14.

109. See, e.g., Russell Shorto, *What’s Their Real Problem With Gay Marriage? (It’s the Gay Part)*, N.Y. TIMES MAGAZINE, June 19, 2005.

110. See Charisse Jones, *Gay-Marriage Debate Still Intense a Year Later*, USA TODAY, May 17, 2005, at A1.

111. A very broad amendment to the Nebraska Constitution which banned not merely same-sex marriage but also any legal recognition of any form of “civil union, domestic partnership, or other similar same-sex relationship” has been held by a Federal Court to violate the U.S. Constitution. See *Judge Voids Same-Sex Marriage Ban in Nebraska*, N.Y. TIMES, May 13, 2005.

of out-of-state same-sex marriages.<sup>112</sup> Reflecting changing public sentiments in the state, in September 2005, the California Legislative Assembly and Senate voted in favor of a law that would allow same-sex marriage. In vetoing the gay marriage bill in California, Governor Schwarzenegger has indicated that he will leave it to the California courts to deal with this contentious issue. While at the time of writing it is uncertain of how the issue will be resolved in California, it is clear that political and judicial sentiments in this liberal state are becoming more receptive to the legal recognition of same-sex relationships.<sup>113</sup>

More than a dozen American states have enacted “registered domestic partnership” (or “civil union”) laws, which are intended to confer specified rights and responsibilities on couples who choose to register with the state, and provide for some process for resolution of disputes upon the termination of such a relationship.<sup>114</sup> While in a number of states these laws allow any two unmarried adults to register, these laws are clearly directed at same-sex couples, with the intent of giving them specified rights, and at least some security and recognition for their relationships. In Vermont, the civil union law was enacted as a result of constitutional litigation and a court order, but in most states these laws have been enacted by the legislature in some response to political advocacy, not litigation. Some states, such as Vermont, Connecticut, and California, have civil union laws that give registered same-sex partners virtually all or most of the same rights and responsibilities as married couples, to the extent permitted under state law. Other states, such as Hawaii, confer only a limited range of rights, in particular focusing on medical treatment decisions and upon death of a partner; these narrower laws were generally enacted in response to concerns about how gay couples could deal with the AIDS crisis. Some cities have also enacted domestic partnership laws that, for example, allow municipal employees to register to gain status for purposes of giving employment benefits to a partner. None of these state and municipal laws confer any status under federal law, and there are questions about how much recognition any of these unions will have outside the state in which the parties registered.

Perhaps the most significant and intense aspects of the debate over the “M word” are symbolic and emotional rather than practical. A

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112. See, e.g., *California Gay Marriage Bill Clears One Hurdle*, N.Y. TIMES, Apr. 26, 2005.

113. See, e.g., Mary Ellen Peterson, *Conservatives Lash Out At Arnold Over Gay Marriage*, 365GAY.COM, Sept. 12, 2005, available at <http://www.365gay.com/newscon05/09/091205arnold.htm>.

114. See, e.g., National Center for Lesbian Rights, *Marriage Equality Factsheet: An Overview of Relationship Recognition for Same-Sex Couples in the United States*, [http://www.nclrights.org/publications/marriage\\_equality0305.htm](http://www.nclrights.org/publications/marriage_equality0305.htm) (last visited Jan. 30, 2006).

number of prominent conservative politicians, like President George W. Bush, say that they are not against gays and lesbians and appear willing to accept significant legal recognition of same-sex relationships through domestic partnership laws, but they also feel that it is necessary to take steps to “preserve marriage.”<sup>115</sup> Opinion polls in the United States generally show a substantial majority of the public is opposed to same-sex marriage, but also in favor of some form of domestic partnership law.<sup>116</sup> While from a practical perspective broadly drafted domestic partnership statutes, such as those in Vermont and California, give significant legal recognition to same-sex relationships, from a symbolic and emotional perspective there is still a substantial difference between “marriage” and a “domestic partnership,” both for those who enter into them and for society as a whole. It is, however, also significant to appreciate that prominent opponents of same-sex marriage now feel obliged to speak in support of civil unions and avoid making openly derogatory comments about gays and lesbians: the “center of gravity” on the debate over the legal recognition of gays and lesbians in the United States has significantly shifted.

#### VI. CONCLUSION: REDEFINING MARRIAGE IN CANADA & THE UNITED STATES

Marriage is one of the oldest, most universal and important of social and legal institutions. It has, however, dramatically changed over the course of recorded history, and today there is great variation around the world in the laws and mores of marriage in different countries.

Marriage for opposite-sex partners in North America is increasingly considered a relationship of equals without legal recognition of distinctive gender roles. Marriage, procreation, and child-rearing are becoming less closely intertwined, with fewer children being raised in marital relationships, more children being raised by single parents, and a growing number of children being raised by same-sex couples. There is also a growing commitment to ending discrimination, including that based on sexual orientation. These developments have all helped fuel the movement towards legal recognition of same-sex partnerships in North America. There are, however, significant differences in Canada and the United States in the progress towards legal recognition of same-sex

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115. Elisabeth Bumiller, *Bush Says His Party Is Wrong To Oppose Gay Civil Unions*, N.Y. TIMES, Oct. 26, 2004, at A21.

116. See National Gay and Lesbian Task Force, *Recent Public Opinion Polls on Same-Sex Marriage & Civil Unions*, at <http://www.thetaskforce.org/downloads/RecentStateMay2005.pdf> (last visited August 20, 2005).

relationships. In Canada, same-sex partners have the full right to marry, while nowhere in the United States can same-sex partners enter into a marriage with a fully equivalent status as opposite-sex married partners, and only one state at present allows for state-sanctioned same-sex "marriage."

One interesting aspect to a comparison in developments in the two countries is the relationship between the development of the law and public opinion. While the words of American constitutional documents are very similar to those in Canada, the political reality is that there is greater public opposition to same-sex marriage in the United States. For all of the complex constitutional argumentation, in some important ways American courts are simply reflecting the policies favored by a more conservative, more religious populace, while Canadian courts are reflecting the more liberal sentiments and values of a majority of the Canadian people. It is far from coincidental that the American jurisdictions where the state courts have been most receptive to recognizing same-sex relationships are also the most politically liberal.

Developments in the two countries also reveal an interesting relationship between legal change and attitudinal change. It is very difficult to effect sudden, dramatic legal change, even through litigation, in the face of the opposition of a majority of the population, but gradual legal change can help to change social attitudes, which can in turn help produce support further legal change. It seems very unlikely that a society can be quickly changed from one having laws that criminalize homosexual acts into one that recognizes same-sex marriage. There need to be some intermediate stages to allow time for social attitudes to change in response to new legal realities and to more socially visible same-sex relationships.<sup>117</sup> The litigation experience in Canada in the 1990s suggests that a constitutionally based claim for same-sex marriage is more likely to succeed if it is the culmination of a series of discrimination based claims. It is legally and politically easier to start with discrimination based claims in the economic sphere, and with changes that clearly advance the interests of children (such as allowing lesbian de facto parents access to children whom they have parented). If the Canadian courts had started in the 1990s with decisions requiring same-sex marriage, they would have been very much out-of-step with public opinion, but by the time that the courts in Canada began to make same-sex marriage decisions in the new millennium, public opinion had

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117. KEES WAALDIJK, *Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe*, 17 CAN. J. FAM. L. 62, 62 (2000) (arguing that European experience reveals a "standard sequence" of decriminalization, followed by anti-discrimination provisions, and then partnership legislation, and perhaps finally, same-sex marriage).

shifted, at least in part because earlier decisions on less contentious situations of discrimination helped to change social attitudes.

While there are significant similarities in family law in Canada and the United States, there are also some substantial differences.<sup>118</sup> In general, the laws of the United States take a narrower approach to the recognition of familial relationships that give rise to rights and obligations. There is greater legal recognition in Canada for unmarried opposite-sex cohabitation and for the role of step-parents. Conversely, marriage and biological parentage play a greater role in family law in the United States, so it is understandable that changing the definition of “marriage” is more difficult in the United States. Despite the differences in the pace of change, the United States is also moving towards greater recognition of same-sex relationships, with even President Bush seeming to accept that there may be some form of domestic partnerships for gays and lesbians, but the movement towards recognition of same-sex marriage is clearly progressing more slowly and much more unevenly than in Canada.

It is also interesting to note the effect of the different division of powers provisions in the two countries. In Canada, the issue of same-sex marriage is a federal issue; this has resulted in liberal judges and politicians imposing same-sex marriage on some of the more conservative parts of the country, like Alberta, where a majority of the population is still clearly opposed to same-sex marriage. In the United States, family law is largely a state issue. This has allowed at least limited forms of recognition of same-sex relationships to be achieved in some of the more liberal states, where there is the most significant support, without any direct threat to the legal regime in more conservative states. If same-sex marriage were a federal issue in the United States, it would be much more difficult to ever achieve legislative recognition for same-sex relationships. Given the more conservative and religious nature of American society, it may be many years before same-sex marriage is accepted in a majority of American states. However, the experience with same-sex marriage in Canada and such states as Massachusetts suggests that the coming years may also serve to demonstrate to Americans that there is no danger and much potential value in giving equal treatment to gay and lesbian partners and their children.

Like prior debates in the family law field over such fundamental issues as no-fault divorce, the debates over same-sex marriage are

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118. For a somewhat dated but still largely valid comparison, see Nicholas Bala, *Family Law in Canada and the U.S.A.: Different Visions of Similar Realities*, 1 INT’L J. L. & FAM. 1 (1987).

occurring simultaneously in different countries. As with those earlier debates, the direction of change seems clear, at least in Western nations, but the pace of change varies greatly, and different countries will have different resolutions to the controversies. These debates are intense and widely engaging because they involve not only politicians, justice system professionals, academics, and those directly affected by any legal change. Rather, the controversy has a deep resonance, as it raises questions about the role of religion in a modern society and the nature of an institution which is of fundamental personal importance to almost everyone.